Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

GERALD ALLAN MISCOVICH,

*Petitioner,*

*vs.*

ELIZABETH O. MISCOVICH,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT,
MIDDLE DISTRICT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Does the presumption of paternity, that a child born or conceived during a marriage is a child of the husband which may not be rebutted by scientific evidence (DNA testing) unless and until non-access, impotence or sterility is demonstrated, violate the husband-presumed father's right to procedural due process of law under the Fourteenth Amendment?

2. Does the presumption of paternity, that a child born or conceived during a marriage is a child of the husband which may not be rebutted by scientific evidence (DNA testing) unless and until non-access, impotence or sterility is demonstrated, violate the husband-presumed father's right to substantive due process of law under the Fourteenth Amendment?

3. Does the state interest in "preserving" non-intact family units outweigh an individual's right not to be deprived of property (money for child support) and liberty (jail for failure to pay) without due process of law?

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## OPINIONS AND ORDERS BELOW

The Order of March 12, 1996, of the Court of Common Pleas of Berks County, Pennsylvania, Case No. 95-1692-00, denying the Petition of Gerald Miscovich for the Introduction of DNA Test Results and/or Blood Tests, and the Memorandum Opinion of that Court dated March 8, 1996, are unreported. They are reproduced in the Appendix to this Petition.

The Opinion of the Superior Court of Pennsylvania in this case, No. 1340 PHL 1996, is reported as *Miscovich v. Miscovich*, 455 Pa. Super. 437, 688 A.2d 726 (1997). It is reproduced in the Appendix. The Court's Order of that same date is also reproduced in the Appendix.

The Order of the Supreme Court of Pennsylvania, No. 36 M.D. Appeal Docket 1998, dated December 14, 1998, affirming because the Court was equally divided, three to three, is reported at __ Pa. __, 720 A.2d 764 (1998). It is reproduced in the Appendix. It is dated December 14, 1998. The Supreme Court of Pennsylvania did not issue an Opinion.

## STATEMENT OF JURISDICTION

The Order sought to be reviewed, a *per curium* Order of the Supreme Court of Pennsylvania affirming the Order of the Superior Court of Pennsylvania was entered December 14, 1998. No Petition for Rehearing was filed, nor has the Petitioner sought an extension of time to file this Petition.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257.

Although the statute involved in this case could be interpreted in a manner that does not violate the Constitution of

the United States, petitioner challenges the constitutionality of the manner in which a Pennsylvania statute, 23 Pa. C.S. § 5104(c) is interpreted. Therefore, 28 U.S.C. § 2403(b) may apply, and this Petition is being served on the Honorable D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania, as required by Rule 29.4(c).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Amendment XIV, Section 1, to the Constitution of the United States, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

23 Pa. C.S. § 5104(c), provides:

> Authority for test. — In any matter subject to this section in which paternity, parentage or identity of a child is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to

submit to blood tests. If any party refuses to submit to the tests, the court may resolve the question of paternity, parentage or identity of a child against the party or enforce its order if the rights of others and the interests of justice so require.

## STATEMENT OF THE CASE

Petitioner, Gerald Miscovich, and Respondent, Elizabeth Miscovich, were married on July 26, 1986. A child, Gerald Anthony Miscovich, was born to Elizabeth on December 28, 1987. Gerald and Elizabeth separated in October 1989. On March 9, 1990, they signed a property settlement agreement which included terms for child support. A divorce decree was entered on December 12, 1990.

During the marriage Elizabeth led Gerald to believe that he was the father of the child. She kept up that pretense after the parties separated and divorced. In December 1991, Gerald learned of the part of Mendel's Law called the law of dominance; that is, because both Gerald and Elizabeth have blue eyes and the child has brown eyes, Gerald could not be the child's father. He promptly had DNA analysis performed on himself and the child by the American Red Cross in January 1992. That scientific test completely excluded Mr. Miscovich as the child's father.

When he received the results, Mr. Miscovich ceased any contact with the child. While she continues to take the position in these proceedings that Gerald Miscovich is the father, Elizabeth also filed a support action against a third party.

The issues were first raised in a petition filed by Gerald Miscovich in the Court of Common Pleas of Berks County,

Pennsylvania, at No. 95-0169-00, on August 29, 1995.[1] Gerald Miscovich averred the performance of DNA testing, and attached the report that excluded him as the father of the child. He sought a stay of support payments pending final determination of the proceedings, and discovery.[2] In its Opinion dated March 8, 1996, and its March 12, 1996 Order, the Common Pleas Court refused to allow a hearing. This was because the presumption of paternity[3] and the inability of Gerald Miscovich to claim that he was incapable of procreation or did not have access to his wife during the period of conception, concluded the issue of paternity against him.

A timely appeal was taken to the Superior Court of Pennsylvania on April 12, 1996. Deprivation of due process is addressed on pages 16 through 19 of the Brief of Gerald

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1. In 1992 and 1993 the parties tried to negotiate a settlement. In 1994 Elizabeth had the third party tested. Elizabeth did not file this support action until May, 1995.

2. Under Pennsylvania decisional law, only facts are to be pleaded. The Court is presumed to know the law and is to apply any theory supported by those facts. *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 277, 505 A.2d 973, 980 (1985); *Heinly v. Pennsylvania*, 153 Pa. Cmwlth. 599, 605, 621 A.2d 1212, 1215, n.5 (1993).

3. Courts sometimes refer to this as the "presumption of legitimacy". In *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380, *cert. denied*, 498 U.S. 850 (1990), the Supreme Court of Pennsylvania ruled that because the status of illegitimacy has been abolished by statute, 23 Pa. C.S. § 5102(a), the presumption would be referred to as the presumption of paternity. Since most states have abolished the disabilities of illegitimacy, we will refer to this presumption as that of paternity, notwithstanding that a number of the decisions discussed in this Petition call it the "presumption of legitimacy".

Miscovich filed in that Court on July 15, 1996. The Superior Court of Pennsylvania affirmed, on January 10, 1997, *Miscovich v. Miscovich*, 455 Pa. Super. 437, 688 A.2d 726 (1997).

A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was filed on February 6, 1997, and granted on April 7, 1998. The due process issues presented were addressed in the brief filed with that Court on May 26, 1998, on pages 13 through 19. That court affirmed in an Order entered December 14, 1998, because it was equally divided. __ Pa. __, 720 A.2d 764 (1998).

## REASONS FOR GRANTING THE WRIT

**ALTHOUGH THIS COURT HAS ADDRESSED THE PRESUMPTION OF PATERNITY IN THE CONTEXT OF AN ALLEGED NATURAL FATHER'S CHALLENGE, IT HAS NOT ADDRESSED THE IMPORTANT ISSUE OF WHETHER THIS PRESUMPTION, WHICH PROHIBITS PROOF THROUGH RELIABLE SCIENTIFIC METHODS, DEPRIVES THE PRESUMED FATHER OF HIS PROPERTY AND LIBERTY. THE DECISION BELOW ALSO IS IN CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT INTERPRETING STATE DUE PROCESS PROVISIONS.**

Notwithstanding the existence of scientific evidence that positively excluded Gerald Miscovich as the father of the child, the courts below denied a hearing because Gerald was unable to offer the proof of sterility, impotence or non-access that is required to overcome the common law presumption of paternity.[4]

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4. Given modern pharmaceuticals, transportation and conjugal visits, very few people could overcome this presumption, making it all but irrebuttable.

The Pennsylvania Supreme Court affirmed by a vote of three to three. The decisions of the lower courts are based on decisions of the Supreme Court of Pennsylvania that hold, notwithstanding a statute allowing scientific evidence where "relevant", 23 Pa. C.S. § 5104(c), that this evidence is not relevant when the common law presumption applies.

The pertinent statute, 23 Pa. C.S. § 5104(c), quoted above, allows the Court to order the parties to submit to blood tests. In *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380, *cert. denied*, 498 U.S. 850 (1990), the Supreme Court of Pennsylvania interpreted the statutory language, "In any matter subject to this section in which paternity . . . is a *relevant* fact . . ." (emphasis added), to make the fact of paternity relevant only when the common law presumption of paternity is overcome. The husband of the mother is conclusively presumed to be the child's father. That presumption was relaxed somewhat in *Jones v. Trojak*, 535 Pa. 95, 634 A.2d 201 (1993) and *Brinkley v. King*, 549 Pa. 241, 701 A.2d 176 (1997), where the parties separated prior to the birth of the child. The Pennsylvania Supreme Court in those cases also considered and applied the related doctrine of estoppel. This establishes paternity and precludes testing when the child has been held out to be the child of, or has been supported by, the person who contests paternity.

This Court addressed the presumption ten years ago in *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), a plurality decision dealing with the claim of a man tests showed was most likely the father of a child born during the marriage of the mother to another man. It involved facts considered by this Court to be "extraordinary". 491 U.S. at 113. The California statute prohibited a third party from seeking testing, although it

allowed a husband-presumed father to seek blood testing within two years of the date of birth. *Michael H.* concerned an alleged fundamental right of a natural father who was seeking to establish the status of co-father, previously unknown to the law.

The present case involves a situation that is more ordinary and usual. Pennsylvania common law creates an absolute prohibition against a hearing, and against the use of reliable scientific evidence, simply because the child was conceived or born during the marriage. The far from extraordinary situation in this case is that a married woman, while cohabiting with her husband, had sexual relations with another man, and a child was born. The husband was led to believe he was the father, and learned he was not two years after the parties separated and divorced. The underlying right of that husband involves property and liberty interests specifically protected by the due process clause. The issues in this case were resolved without a hearing, without even considering whether the stated purpose of the presumption, preservation of intact families, was served. Gerald must pay money for the support of another man's child. Should he fail to make those payments he is subject to imprisonment. This is property and liberty in the literal sense.

The alleged state interest behind the presumption, preservation of the "family unit", *see Miscovich v. Miscovich*, 455 Pa. Super. 437, 688 A.2d 726, 728 (1997), cannot outweigh the deprivation of property and liberty suffered by the man who is presumed to be the father. The state's interest in these matters is only the fair and impartial adjudication of disputes. *Rivera v. Minnich*, 483 U.S. 574, 581, n.8, 97 L. Ed. 2d 473, 107 S. Ct. 3001 (1987). It is not an interest that can withstand analysis since it treats married men (presumed

fathers) differently than unmarried men (natural fathers), and allows children born during wedlock no right to find their true father, while giving that right to children born out of wedlock. As a result of this, children born during wedlock are unable to learn the medical history of their true parents, jeopardizing their health in general and where transplants or stem cell transplants are necessary. They are also unable to meet the strong psychological need to find their true parents.

Several State Supreme Courts have followed *Michael H.* in holding that a natural father does not have the necessary liberty interest to overcome the presumption of paternity. *E.g.*, *Paternity of C.A.S.*, 161 Wis.2d 1015, 468 N.W.2d 719 (1991); *Ex parte Presse*, 554 So.2d 406 (Ala. 1989). Other courts have declined to follow *Michael H.* and interpret due process clauses of their state constitutions to allow the presumption to be rebutted by scientific evidence. In *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990), the Supreme Judicial Court of Massachusetts held that a putative third party father is entitled to present scientific evidence to overcome the presumption when he shows by clear and convincing evidence that he has a relationship with the child. In *Interest of J.W.T.*, 872 S.W.2d 189 (Tex. 1994), the Texas Supreme Court abolished the presumption of paternity under that state's "due course of law" guaranty, and held that a putative father has standing to sue for visitation with a child who has a presumed father. In *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 474 A.2d 554 (1996), the Supreme Court of West Virginia abolished the presumption of paternity if the putative father establishes a substantial parental relationship with the child. Iowa's intermediate appellate court, in *In re Marriage of Bethards*, 526 N.W.2d 871 (Iowa App. 1994), allowed the husband-presumed father to challenge his presumed paternity with scientific evidence.

At the end of the twentieth century science has advanced to the point of being able to determine, with certainty, whether a man is not the biological father of a child. In this case, the lower courts made that determination without considering any evidence. The presumption of paternity, based on English common law of 1569 (*see Michael H.*, 491 U.S. at 124), has been applied to deprive Gerald Miscovich of a hearing, and of his substantive rights not to have his property used for the support of another man's biological child. While this Court rejected the supposed liberty interest of the putative natural father in *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S.Ct. 2333 (1989), it has not addressed the due process rights of the presumed father, and should do so in this case.

## CONCLUSION

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari, and issue a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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